

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANGELA KOLEBUCK-UTZ, individually and  
on behalf of those similarly situated,

Plaintiff,

v.

WHITEPAGES INC.,

Defendant.

CASE NO. C21-0053-JCC

ORDER

This matter comes before the Court on Defendant Whitepages Inc.’s motion to dismiss (Dkt. No. 12). Having thoroughly considered the parties’ briefing and the relevant record, the Court hereby DENIES the motion for the reasons explained herein.

**I. BACKGROUND**

Defendant owns and operates a website that sells “background reports” and monthly subscription services to access such reports. (Dkt. No. 1 at 1, 4.) To entice users to purchase these products, Defendant allows a user to initially search for a person using that person’s name, without charge; the user is then provided a list of possible persons, including identifying information, and given the option of receiving a “free preview” of Defendant’s “report” on the searched individual. (*Id.* at 1, 2.) Plaintiff alleges Defendant used her name and likeness in its free previews and advertisements to “entice users to purchase Whitepages’ services.” (*Id.* at 2,

1 4.) After the user viewed the free preview and clicked on the buttons “View Full Report,”  
2 “Unlock Full Report,” or “Sign Up,” Defendant presented the user with the option to purchase a  
3 monthly subscription service. (*Id.* at 4.) Plaintiff argues that Defendant’s use of her persona  
4 violated Ohio’s right of publicity law, Ohio Revised Code § 2741.01 *et. seq.*, because Defendant  
5 did not obtain written consent to use her persona in its advertisements. (*Id.* at 8.)

6 In this putative class action, Plaintiff seeks compensatory, statutory, and punitive  
7 damages and injunctive relief, among other relief, on behalf of herself and similarly situated  
8 individuals, for the alleged violation. (*Id.* at 9.)

9 Defendant moves to dismiss Plaintiff’s complaint pursuant to Federal Rule of Civil  
10 Procedure 12(b)(6), arguing its use of Plaintiff’s name (a) did not violate Ohio Revised Code  
11 § 2741.01 *et. seq.*, (b) was protected as noncommercial “directory information” under the First  
12 Amendment of the U.S. Constitution and Article 1, § 11 of the Ohio Constitution, and (c) was  
13 immunized by the Communications Decency Act (“CDA”). (Dkt. No. 12 at 2–10.)

## 14 **II. LEGAL STANDARD**

15 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
16 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
17 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is  
18 facially plausible “when the plaintiff pleads factual content that allows the court to draw the  
19 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “A pleading that  
20 offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will  
21 not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).

## 22 **III. DISCUSSION**

23 Ohio’s right of publicity law provides that “a person shall not use any aspect of an  
24 individual’s persona for a commercial purpose” unless that person has obtained written consent  
25 from the individual. Ohio Rev. Code §§ 2741.01, 2741.02.

**A. Claim Based Upon a Violation of Ohio’s Right of Publicity Law**

Plaintiff alleges Defendant used her “persona” for a commercial purpose in violation of Ohio Revised Code § 2741.02. (Dkt. No. 1 at 8.) Defendant argues it used only her name, rather than her persona, and, regardless, even if it did use her persona, Plaintiff’s persona does not have “commercial value” and, therefore, cannot constitute a violation of the statute. (*See* Dkt. No. 15 at 3.) The statute defines “persona” as “an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value.” Ohio Rev. Code § 2741.01(A). Here, Plaintiff’s complaint clearly alleges that Defendant displayed Plaintiff’s name and identifying information on its website, in what has been described as a free preview, as an enticement to purchase Defendant’s subscription service. (*See* Dkt. Nos. 1 at 2, 22; 12 at 1.) Although use of identifying characteristics may not be required to represent a violation under the statute, Defendant’s alleged use of Plaintiff’s uniquely identifiable characteristics, (*see* Dkt. No. 1 at 2), further supports Plaintiff’s allegation that it really was Plaintiff’s name and persona that Defendant used, rather than the name of a similarly named person. (*See* Dkt. No. 13 at 5 (citing *Lukis v. Whitepages*, 454 F. Supp. 3d 746, 761 (N. D. Ill. 2020).))

**1. Commercial Value of Plaintiff’s Name**

Defendant argues that Plaintiff’s name, as a non-public person, could not have commercial value as a matter of law and, even if it could, Plaintiff did not plead adequate facts to establish its commercial value here. (Dkt. No. 12 at 4–6). The Court disagrees. To assert a right of publicity claim, Plaintiff must only plead that there is *some* value in associating a good or service with her identity. *See Harvey v. Systems Effect, LLC*, 154 N.E. 3d 293, 306 (Ohio App. 2020). In *Roe v. Amazon*, for example, the defendant used the plaintiffs’ image without permission on the cover of a book the defendant authored and sold. *See* 170 F. Supp. 3d 1028, 1030 (S.D. Ohio 2016). The plaintiffs were not celebrities and their image did not have “widely marketable commercial value.” *Id.* Nevertheless, the court, held that the plaintiffs’ image had

commercial value because the defendant deliberately used it for commercial gain, thereby infringing on the plaintiffs' rights. *Id.* at 1033. Unlike *Harvey*, where the court found that use of the plaintiff's name was incidental and the defendant did not obtain any commercial value from it, *see* 154 N.E. 3d. at 306, Plaintiff alleges that Defendant used her name to entice users to purchase Defendant's product. (Dkt. No. 1 at 4.) This is sufficient to establish commercial value as a matter of law. Moreover, Plaintiff provides sufficient facts to plausibly allege a violation of Ohio's right of publicity law, based on the allegations of commercial use. (*See id.* at 4–5 (alleging that Plaintiff's persona was used to entice users to sign up for Defendant's monthly subscription service).) Therefore, Plaintiff states a claim for relief based on alleged violations of Ohio's right of publicity law.

## **B. Freedom of Speech Argument**

Defendant next argues that Ohio's right of publicity law's limitation, if any, on its use of Plaintiff's persona represents a First Amendment<sup>1</sup> violation (*See* Dkt. Nos. 12 at 6–10, 15 at 4). In order to assess Defendant's argument, the Court must first determine whether Defendant's alleged use of Plaintiff's persona was commercial or noncommercial speech. While commercial speech is entitled to some First Amendment protections, noncommercial speech is entitled to greater protections. *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60, 65 (1983). Laws restricting commercial speech are analyzed under intermediate scrutiny, while laws restricting noncommercial speech are analyzed under strict scrutiny. *See Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 954, 962 (9th Cir. 2012).

### **1. Commercial Speech**

Whether something constitutes commercial speech largely depends on whether the content “does no more than propose a commercial transaction.” *Virginia State Bd. Of Pharmacy*

---

<sup>1</sup> The Court refers to the First Amendment of the U.S. Constitution and Article 1, §11 of the Ohio Constitution, collectively, as the “First Amendment” in light of the court's holding in *Cleveland v. Trzebuckowski*, 709 N.E.2d 1148, 1152 (Ohio 1999) (citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals* (1992), 588 N.E.2d 116, 123 (stating “[t]he First Amendment is the proper basis for interpretation of Section 11, Article I, Ohio Constitution”)).

1 *v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Relevant factors include  
 2 “(i) [] advertising format, (ii) [] reference to a specific product, and (iii) the underlying economic  
 3 motive of the speaker.” *Dex Media*, 696 F.3d at 958 (quoting *Assoc. of Nat’l. Advertisers, Inc. v.*  
 4 *Lungren*, 44 F.3d 726, 728 (9th Cir.1994)) (holding that Defendant Yellowpages’ content was  
 5 noncommercial speech where (1) the advertisements were restricted to only cover a certain  
 6 percentage of each page and (2) did not reference only one specific product and were created by  
 7 third parties).

8 Here, Plaintiff alleges that: (i) Defendant’s advertisements using Plaintiff’s persona were  
 9 found on the same web page as Defendant’s enticement for its subscription services; (ii) the  
 10 enticements were described as the “full report” of Plaintiff’s identity, available through  
 11 Defendant’s monthly subscription service; and (iii) Defendant’s motive was singularly “to entice  
 12 users to purchase Defendant’s services.” (See Dkt. No. 1 at 2, 4.) These allegations are sufficient  
 13 to establish that Defendant’s advertisements using Plaintiff’s persona were, in fact, commercial  
 14 speech.

## 15 2. Intermediate Scrutiny

16 In applying intermediate scrutiny to a law limiting commercial speech, the Court  
 17 considers whether: (1) the speech “concern[s] lawful activities and [is] not [] misleading;” (2) the  
 18 government has a “substantial” interest in restricting the speech; (3) the regulation “directly  
 19 advances the governmental interest” involved; and (4) the regulation is not “more excessive than  
 20 is necessary to serve that interest.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of*  
 21 *New York*, 447 U.S. 557, 566 (1980). To support its argument that Ohio’s right of publicity law,  
 22 as applied by Plaintiff to Defendant’s advertisements of its subscription services using Plaintiff’s  
 23 persona, violates First Amendment protections, Defendant relies on a case concerning  
 24 noncommercial speech. (See Dkt. No. 12 at 9 (citing *Sarver v. Chartier*, 813 F.3d 891, 905 (9th  
 25 Cir. 2016).) This is not helpful. In support of its motion, Defendant must cite to persuasive or  
 26 controlling cases addressing the application of the intermediate scrutiny factors required for

1 similar commercial speech as that alleged by Plaintiff. Defendant fails to do so. (*See generally*  
2 Dkt. Nos. 12, 15.) Therefore, Defendant's briefing provides the Court no basis to dismiss  
3 Plaintiff's claim on First Amendment grounds.

#### 4 **C. Communications Decency Act**

5 Finally, Defendant argues dismissal is warranted based on the protections afforded by the  
6 CDA, 47 U.S.C. §§ 230(c)(1), (e)(3). (Dkt. No. 12 at 9.) According to Defendant, it does not  
7 generate content and, therefore, its use of Plaintiff's persona is protected by the CDA. (*Id.*) But  
8 Plaintiff's complaint alleges Defendant *does*, in fact, generate content. (*See* Dkt. No. 1 at 5.) At  
9 this stage the Court must accept the allegations in Plaintiff's complaint as true. *See Twombly*,  
10 550 U.S. at 555. Defendant's argument does not provide a basis for dismissal of Plaintiff's  
11 complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

#### 12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court DENIES Defendant's motion to dismiss (Dkt. No.  
14 12.)

15  
16 DATED this 22nd day of April 2021.

17  
18  
19 

20 John C. Coughenour  
21 UNITED STATES DISTRICT JUDGE  
22  
23  
24  
25  
26